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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

BRITTANY DANIELS,

Defendant and Appellant.

B185158

(Super. Ct. No. BA274819)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruffo Espinosa, Judge. Affirmed as modified.

Ronald White for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Brittany Daniels appeals from a judgment entered after a jury found her guilty of three counts of robbery and found firearm enhancement allegations to be true. Daniels contends her due process rights were violated because eyewitness identifications made at trial were tainted by an impermissibly suggestive field show-up. She also contends there was insufficient evidence identifying her as one of the persons who robbed the victims. We reject each of her contentions.

FACTS AND PROCEEDINGS BELOW

I. THE CHARGES

An information charged Brittany Daniels with three counts of second degree robbery.¹ As to all three counts, the information alleged Daniels personally used a handgun² and a principal was armed with a handgun³ during commission of the offense.

II. EVIDENCE PRESENTED AT TRIAL

At about 8:00 p.m. on November 22, 2004, Carlos Archila, Cesar Portillo and Jose Prado (the victims)⁴ arrived at a park where they planned to play basketball. As Cesar exited his car, he saw a group of people gathered by some benches about 100 to 125 feet away. The three young men started to walk to the public restroom. Because the area near the restroom was so dark, Jose decided he would relieve himself outside near some trees. The only light in this area came from a fluorescent overhead lamp more than 40 feet away.

¹ Penal Code section 211. All further statutory references are to the Penal Code.

² Section 12022.53, subdivision (b).

³ Section 12022, subdivision (a)(1).

⁴ We will refer to these victims by their first names because one of them, Jose Prado, has the same surname as another eyewitness, William Prado.

Two African American people who were part of the group gathered by the benches approached Carlos, Cesar and Jose. The victims described these two people as a tall man wearing a blue jacket with a Clippers basketball team logo on it and a shorter man wearing a black hooded sweatshirt. The hood of the black sweatshirt was on the shorter person's head, but the victims could still see this person's face and about eight or nine thick hair braids coming out of the hood. At trial, Carlos, Cesar and Jose would identify the person in the black hooded sweatshirt as defendant Brittany Daniels. During the commission of the offenses, however, the victims believed Daniels was a man.

Daniels inquired whether the victims belonged to a street gang, asking "where are you from?" The victims denied any gang affiliation. Daniels hollered out "30's" or "30 Harlem," which the victims understood as a reference to a gang. Then Daniels ordered them to leave the park. They started walking toward the exit, but Daniels stopped Jose and the man in the blue jacket stopped Carlos. Daniels told Jose to give her his "stuff." Jose said he didn't have anything. Daniels pulled something out of her sweatshirt and repeated her demand. When Jose still refused to turn over anything, Daniels pointed a gun at him and said, "This isn't a game." The gun was about three feet away from Jose's face. Jose pulled out a blue cell phone and Daniels "snatched it from" him. Even though the light at the park was "dim," Jose did not have any difficulty seeing what Daniels looked like because she was so close to him.

Carlos was standing about five feet away from Jose and Daniels, and he was looking at Daniels out of the corner of his eye. Carlos saw Daniels point a gun at Jose's face. The man in the blue jacket ordered Carlos to empty his pockets and he reached out to search Carlos. Carlos pushed the man's hand away from his pocket. The man appeared angry and asked Carlos, "you want to fight for it?" The man walked over to Daniels and retrieved the gun she was holding. He pointed it at Carlos and again ordered him to empty his pockets. The man reached into Carlos's pockets and took his cell phone and wallet. Then the man told the victims to leave the park. Cesar stood there watching as Daniels and the man in the blue jacket accosted his friends.

William Prado came to the park to play basketball with Carlos, Cesar and Jose. He arrived in time to see Daniels and the man in the blue jacket standing with the victims and taking their property. He saw the man holding a gun. William was standing about 20 feet away. The victims began to walk toward the exit of the park. William recognized Daniels as someone with whom he went to middle school. William called out to Daniels and said he and the victims were only there at the park to play basketball and they “didn’t want any problems.” Daniels told William he “had [his] stuff” and he “would be better off” if he left the park right away.

As the victims walked toward the exit of the park, about five to eight other people who had been hanging out near the benches approached them. Daniels and the man in the blue jacket joined this group.⁵ A person whom the victims described as a light-skinned Latina woman with braided hair searched Cesar and took his silver-colored cell phone. She also started to search Jose. Jose told her he already had been searched. The woman told Jose not to look at her “like that,” and she punched him on his right cheek. Then she punched Carlos in the neck. It was at this point Carlos, Cesar and Jose first noticed William had arrived at the park.⁶ William recognized the Latina woman from school and he told her so. William asked the group to return the victims’ property. The man in the blue jacket looked through Carlos’s wallet and threw it back to him. The cell phones were not returned.

The victims and William walked to their cars. Daniels and the rest of her group walked back toward the benches. William got in his car and drove to the police station to report the crimes. Carlos got in Cesar’s car and Jose got in his own car. The three victims decided to follow the robbers and their associates, who at this point were walking

⁵ According to Carlos, as the victims walked toward the exit they could see Daniels’s face more clearly because there was more light.

⁶ Daniels asserts William was not a witness to the robberies committed by the person in the black hooded sweatshirt and the man in the blue jacket. As set forth above, William testified when he arrived at the park he observed Daniels and the man in the blue jacket “taking [the victims’] property.” The fact the victims might not have seen William until later does not mean his testimony was false.

out of the park. The group split up. Carlos and Cesar followed Daniels and the man in the blue jacket. Jose followed the Latina woman and some other men. Eventually, the victims lost sight of the robbers when the robbers entered the yard of a house. Cesar and Jose parked their cars. Carlos and Jose each flagged down a patrol car, told the police they had been robbed, and pointed out the location where the robbers had gone. The victims told the police to look for four male, African American suspects.

Several police units searched the area for suspects. One of them detained Daniels and the man in the blue jacket. The officers believed Daniels was a man until Daniels or one of the other potential suspects told them otherwise. When officers searched Daniels, they recovered Jose's blue cell phone. Another police unit detained the Latina woman and some other men. When officers searched this woman, they recovered Cesar's silver-colored cell phone.⁷

William met up with Carlos and Cesar, and the three of them got into the back of a patrol car and went to a field show-up, which took place about 25 minutes after the victims left the scene of the robberies.⁸ Officers admonished them the persons detained may or may not be the persons involved in the robberies. William, Carlos and Cesar identified Daniels and the man in the blue jacket. Daniels did not have the hood on her head during the field show-up. The police drove William, Carlos and Cesar to another field show-up. There they identified the Latina woman. They told officers two of the other detainees were at the park at the time of the robberies, but were not involved in the crimes. Jose also identified the Latina woman. He was not taken to the location where Daniels was detained.

⁷ The police report apparently states the blue cell phone was recovered from the Latina woman and the silver-colored cell phone was recovered from Daniels. Officers who testified at trial said the opposite was true and the police report was inaccurate in this respect.

⁸ The field show-up occurred about 10 to 15 minutes after the victims lost sight of the robbers.

According to the officer who transported Daniels to the police station, Daniels waived her *Miranda*⁹ rights and made a statement. Daniels said she bought a gray cell phone from a “smoker” (a person who abused crack cocaine) at about 4:00 p.m. that day.

At trial, Carlos, Cesar and Jose identified Daniels as one of the persons who robbed them and the person who pointed the gun at Jose. William also identified Daniels in court. The four eyewitnesses expressed no doubt about their identifications. The eyewitnesses and the officers who detained Daniels testified Daniels had braids in her hair at the time of the field show-up. Daniels did not have braids in her hair, however, in her booking photo taken on the night of her arrest. An officer testified Daniels was in a cell without handcuffs before her booking photo was taken. This officer also testified to the extent Daniels had rubber bands or fake braids in her hair at the time she was arrested, she would have had to remove them before her booking photo was taken.

III. THE JURY’S VERDICT AND DANIELS’S SENTENCE

The jury found Daniels guilty of three counts of second degree robbery. With respect to the robbery of Cesar Portillo (count 1), the jury found the firearm enhancement allegations to be not true. As to the robbery of Carlos Archila (count 2), the jury found true the allegation a principal was armed with a handgun, but found not true the allegation Daniels personally used a handgun. With respect to the robbery of Jose Prado (count 3), the jury found both firearm enhancement allegations to be true.

The trial court sentenced Daniels to the low term of two years for the robbery in count 3, plus a term of 10 years for the firearm enhancement.¹⁰ On counts 1 and 2, the

⁹ *Miranda v. Arizona* (1966) 384 U.S. 436.

¹⁰ At the sentencing hearing, the trial court stated it was imposing the 10-year enhancement under section 12022, subdivision (a)(1). This section provides only a one-year enhancement where a principal is armed with a handgun. It is clear the court intended to impose the 10-year enhancement under section 12022.53, subdivision (b) based on the jury’s finding Daniels personally used a handgun during the robbery of Jose Prado. The trial court explained it could not strike the 10-year enhancement pursuant to

court imposed concurrent terms of two years for each robbery. With respect to count 2, the court also imposed a concurrent term for the firearm enhancement under section 12022, subdivision (a)(1).¹¹

DISCUSSION

I. THE EYEWITNESS IDENTIFICATIONS WERE PROPERLY ADMITTED AT TRIAL.

Daniels contends her due process rights were violated because eyewitness identifications made at trial were tainted by an impermissibly suggestive field show-up. By failing to object below, Daniels waived this issue on appeal.¹² We address the issue notwithstanding Daniels's waiver because she asserts an ineffective assistance of counsel claim based on her trial counsel's failure to object to the eyewitness identifications.

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the

subdivision (h). The subdivision the court was referring to is found in section 12022.53, not section 12022. Later in the proceedings, the trial court stated it was staying the enhancement under section 12022, subdivision (a)(1) as to this robbery (count 3). We will direct the clerk of the superior court to prepare a modified abstract of judgment which correctly reflects which enhancement was imposed and which enhancement was stayed.

¹¹ The trial court stated it was imposing a 10-year firearm enhancement under section 12022, subdivision (a)(1). As discussed above, this section provides only a one-year enhancement where a principal is armed with a handgun. The 10-year enhancement under section 12022.53, subdivision (b) is not applicable to count 2 because the jury found not true the allegation Daniels personally used a handgun during the robbery of Carlos Achila. The jury found true the allegation a principal was armed with a handgun. We will direct the clerk of the superior court to prepare a modified abstract of judgment which reflects the firearm enhancement imposed under section 12022, subdivision (a)(1) as to count 2 is a one-year enhancement, not a 10-year enhancement.

¹² *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *People v. Medina* (1995) 11 Cal.4th 694, 753.

identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification."¹³ "Defendant bears the burden of showing unfairness as a demonstrable reality, not just speculation."¹⁴

"Whether an identification procedure is suggestive depends upon the procedure used as well as the circumstances in which the identification takes place. For example, although "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup has been widely condemned" [citations], sometimes exigent circumstances make such procedures necessary."¹⁵ "[S]ingle-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification."¹⁶ Field identifications allow law enforcement to exclude a detainee as

¹³ *People v. Cunningham*, *supra*, 25 Cal.4th at page 989, citing *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107.

¹⁴ *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.

¹⁵ *People v. Nguyen* (1994) 23 Cal.App.4th 32, 38.

¹⁶ *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387; *People v. Nguyen*, *supra*, 23 Cal.App.4th at pages 38-39 ("Prompt identification of a suspect who has been apprehended close to the time and place of the offense to exonerate the innocent and aid in discovering the guilty is a valid purpose for conducting a one person showup . . .").

a suspect and continue to “search for the suspect while it is reasonably likely he [or she] is still in the area.”¹⁷

The identification Daniels claims was impermissibly suggestive was a field show-up identification made by Carlos, Cesar and William within 25 minutes after they left the scene of the robberies. Victims Carlos, Cesar and Jose followed the persons who robbed them as they left the park. The three victims flagged down the police and pointed to the location where they believed the robbers were fleeing or hiding. The victims only lost sight of the robbers for about 10 to 15 minutes. The police detained several people they found in the area. They asked Carlos, Cesar and William to go to two different locations and view the detainees to see if they had the robbers in custody.¹⁸ At the first location, the three eyewitnesses identified Daniels and the man who had committed the robberies with Daniels. At the second location, they identified the Latina woman who had accosted them. They told the police the other detainees were present at the scene of the robbery but were not involved in the crimes.

Daniels argues the field show-up was impermissibly suggestive because she was wearing handcuffs, had a spotlight focused on her and was the only detainee at her location wearing a black hooded sweatshirt. If these circumstances constituted evidence of inherent unfairness in the manner in which the show-up was conducted, nearly every in-field identification would be excluded at trial.¹⁹ As discussed above, courts tolerate

¹⁷ *People v. Johnson* (1989) 210 Cal.App.3d 316, 323.

¹⁸ Daniels asserts the field show-up was impermissibly suggestive because the police told the eyewitnesses “they had ‘the suspects’” in custody. Carlos, Cesar and William all testified the police admonished them the detainees may or may not be the persons involved in the robberies. During cross-examination, however, Cesar indicated the police told them they had the “suspects” in custody. The officer who was present at the in-field identification of Daniels testified he admonished the eyewitnesses the detainees may or may not be the persons who robbed them. Based on the record before us, we cannot say the field show-up was impermissibly suggestive because the police told the eyewitnesses they had the robbers in custody.

¹⁹ See *In re Carlos M.*, *supra*, 220 Cal.App.3d at page 386 (“While appellant claims the handcuffs influenced the victim to believe appellant was involved, the mere presence

some “suggestiveness inherent in the procedure” because of the important purposes an in-field identification can serve.²⁰ The field show-up at issue here allowed the police to identify the alleged robbers, release detainees who had done nothing wrong, and call off the search for additional suspects. Nothing about the particular procedure used in this case -- including the fact the three eyewitnesses were placed in the back of the same patrol car at the field show-up -- was “so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.”²¹

Even if the field show-up was unduly suggestive, we would nevertheless find the identifications reliable under the totality of the circumstances. Carlos, Cesar and William identified Daniels 25 minutes after the robberies occurred and about 10 to 15 minutes after Carlos and Cesar lost sight of the robbers, when the events were fresh in their minds and their identifications were more likely to be reliable. William knew Daniels from school and he recognized her when he saw her standing with the three victims in the park. Jose, who was not present for the field show-up, identified Daniels at trial as the person who robbed him at gunpoint.

Based on the foregoing, we conclude the eyewitness identifications made at trial were not tainted by an impermissibly suggestive field show-up. Thus, counsel’s failure to object to the identifications on this ground does not constitute ineffective assistance of counsel. We cannot make a finding trial counsel’s representation was deficient or the result would have been more favorable to Daniels if her counsel had made an objection.²²

of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification”).

²⁰ *In re Carlos M.*, *supra*, 220 Cal.App.3d at page 387.

²¹ *In re Carlos M.*, *supra*, 220 Cal.App.3d at page 387.

²² *In re Jones* (1996) 13 Cal.4th 552, 561 (“[t]o establish ineffective assistance of counsel, a [defendant] must demonstrate that (1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected the [defendant] to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the [defendant]”).

II. THE EVIDENCE OF DANIELS'S IDENTITY WAS SUFFICIENT TO SUPPORT HER CONVICTIONS.

Daniels contends there was insufficient evidence to support the robbery convictions. She focuses her challenge on the evidence concerning her identity. She asserts, "The eyewitness evidence presented at trial does not inspire confidence in the verdict." Under the substantial evidence standard of review we must apply, Daniels's claim has no merit.

When an appellant challenges the sufficiency of the evidence, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."²³ We reverse only where the record clearly shows there is no basis upon which the evidence can support the jury's verdict.²⁴

Daniels asserts the eyewitnesses did not have a good opportunity to observe her because it was dark in the park. Even though the only light was dim, and it came from an overhead lamp more than 40 feet away, the victims testified they were able to see Daniels and identify her. She was standing right in front of them. None of the eyewitnesses expressed any doubt about the in-field or in-court identification. Daniels claims the fact the victims did not know she was a woman at the time of the crimes indicates they did not have a good opportunity to observe her. The officers who detained Daniels -- presumably in better light -- did not know Daniels was a woman either until someone alerted them to this fact.

Daniels also points out a victim's identification can be affected by the fear and stress caused when a victim is robbed at gunpoint by suspected gang members. The trial court instructed the jury with CALJIC No. 2.92 which lists factors to consider in determining the weight to be given to eyewitness testimony, including "[t]he opportunity

²³ *People v. Johnson* (1980) 26 Cal.3d 557, 578.

²⁴ *People v. Montero* (1986) 185 Cal.App.3d 415, 424, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.

of the witness to observe the alleged criminal act and the perpetrator of the act” and “[t]he stress, if any, to which the witness was subjected at the time of the observation.” Daniels’s counsel had an opportunity to cross-examine the eyewitnesses and argue about the circumstances which could have affected the reliability of their identifications.

Daniels asserts the eyewitnesses identified her at the field show-up merely because she was wearing a black hooded sweatshirt like the robber. The record does not support this assertion. William recognized Daniels from school when he saw her taking property from the victims. He would have recognized her 25 minutes later regardless of what she was wearing. At trial, Cesar testified he based his in-field identification on Daniels’s clothing as well as her face. Carlos testified he based his in-field identification on Daniels’s clothing and not her hairstyle. Elsewhere in his trial testimony, however, he said he got a good look at Daniels’s face during the commission of the robberies.

Daniels notes the eyewitnesses all testified she had braids in her hair during the field show-up, but her booking photo shows she did not have braids. The officers who detained Daniels also testified she had braids in her hair. To the extent Daniels had rubber bands or fake braids in her hair, she would have been required to remove them before her booking photo was taken. Daniels also had an opportunity to loosen her hair when she was placed in a cell without handcuffs before her booking photo was taken.

Daniels asks this court to evaluate the credibility of the witnesses and reweigh the evidence. This we cannot do. Our task is to review the record to determine if substantial evidence supports the convictions. Under this standard of review, there is more than sufficient evidence identifying Daniels as one of the persons who robbed the victims.

DISPOSITION

The clerk of the superior court is directed to prepare a modified abstract of judgment reflecting the 10-year firearm enhancement on count 3 was imposed under section 12022.53, subdivision (b), not section 12022, subdivision (a)(1), the one-year firearm enhancement on count 3 under section 12022, subdivision (a)(1) was stayed, and

also the firearm enhancement imposed under section 12022, subdivision (a)(1) on count 2 is a one-year enhancement, not a 10-year enhancement. As so modified, the judgment is affirmed.

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JOHNSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.